

Caridis, Alyssa

From: Caridis, Alyssa
Sent: Tuesday, April 21, 2015 8:38 PM
To: 'Randall Garteiser'; Francis McGovern (mcgovern@law.duke.edu)
Cc: Ramsey, Gabriel M.; AudibleMagic-BlueSpike; Reines, Edward; Walter Lackey; Eric Findlay; <bluespike@ghiplaw.com>; H Dutton; 'Perito, Andrew'
Subject: RE: Getting on the same page with Rebuttal Deadlines [[Blue Spike]]

Professor McGovern –

With all due respect and admiration for the work that you are doing in this case, Audible Magic does not believe that this is an issue appropriate for a Special Master's determination. Blue Spike's requested extension affects some of the more important deadlines in the Court's schedule – deadlines which the Court has instructed cannot be modified without leave of the Court itself. In addition, Blue Spike's request is highly inappropriate and prejudicial to Audible Magic. To be perfectly clear, today is the parties' agreed-to deadline to serve rebuttal expert reports. Audible Magic has diligently prepared its reports and will be serving them tonight. But now, at the 11th hour, Blue Spike is choosing to completely eschew its obligations and is asking for an unreasonable extension.

As recently as March 23, 2015, Blue Spike agreed to serve *all* of its rebuttal reports today, April 21, 2015. It is important to note that by March 23, Blue Spike had already been in possession of Audible Magic's opening reports for over three weeks. Blue Spike provides no explanation what has happened between March 23 and today that suddenly requires a 30 day extension for its reports. Audible Magic first learned that Blue Spike intended to seek an extension on these reports three days ago – on Saturday, April 18. Either Blue Spike did not bother to begin to prepare its rebuttal reports until last week, or it purposely waited until the last minute to ask for an extension, knowing full well that Audible Magic would have its reports ready to go. Audible Magic is serving its rebuttal reports today. To give Blue Spike an additional 30 days to craft additional reports, including with the full benefit of having Audible Magic's rebuttal reports, would be extremely prejudicial.

The Scheduling Order in this case specifically notes that expert discovery deadlines may only be extended if the extension “**does not affect** the trial setting, dispositive motions deadline, challenges to experts deadline, or pretrial submission deadline.” Dkt. 1332 at para 8 (emphasis in original). Blue Spike's proposed change will materially affect those dates, contrary to the Court's mandate (of course, Blue Spike does not even address this point). Specifically, at least the following dates would be affected:

- Deadline to file letter briefs on dispositive motions (including summary judgment, striking experts, and *Daubert*) – current deadline is April 27. Under Blue Spike's proposal, Audible Magic would not even have rebuttal reports before having to file letter briefs.
- Deadline for dispositive motions – current deadline is June 5. Under Blue Spike's proposal, rebuttal reports would be served on May 21. The parties would then have 2 weeks to digest those reports, conduct expert depositions, determine grounds for filing dispositive motions (of course, ignoring that the deadline to file a letter brief had already passed), and brief those issues. Such a condensed schedule is manifestly untenable.
- Pretrial disclosures – currently due August 5. There is no room to move the deadline for dispositive motions without disturbing this and other pre-trial deadlines.

The parties have received clear instruction from the Court that specific dates are set in stone. Blue Spike's requested extension entirely ignores this.

In addition, Mr. Garteiser's e-mail is the first time that Blue Spike has indicated that it will not be serving its rebuttal damages expert report tonight. It is unclear what a “calendaring and distribution issue” even means. It is rather

unbelievable that Blue Spike simply forgot that it had a rebuttal report due today. And even if Blue Spike is to be believed, there is absolutely no explanation why Blue Spike needs 30 days to present a rebuttal damages report.

During today's teleconference, Audible Magic offered Blue Spike an extension on its rebuttal reports until Friday. That is the maximum extension that Blue Spike should be afforded.

Best regards,

Alyssa Caridis

From: Randall Garteiser [mailto:rgarteiser@ghiplaw.com]
Sent: Tuesday, April 21, 2015 6:30 PM
To: Francis McGovern (mcgovern@law.duke.edu)
Cc: Ramsey, Gabriel M.; AudibleMagic-BlueSpike; Reines, Edward; Walter Lackey; Eric Findlay; <bluespike@ghiplaw.com>; H Dutton
Subject: Re: Getting on the same page with Rebuttal Deadlines [[Blue Spike]]

Prof. McGovern:

Since the parties prior stipulated extension request below was not entered into the docket, Blue Spike requests an additional extension on all expert rebuttal reports until May 21. The defendants oppose this request, but we copy them on this email to inform them of our request being made of you.

Based on your authority provided to you by the Court, would you be able to approve this extension to May 21.

Good cause exists as Blue Spike is forced to retain another expert to respond to the 3600 page invalidity report (combination of two reports). Blue Spike is going to disclose Dr. Yannis Papakonstantinou. We are in the process of pulling together his expert disclosure requirements to ascertain if the defendants will move to strike him. Since defendants are relying upon "secret prior art" that's been marked highly confidential and outside attorneys' only, Blue Spike must disclose him under the protective order.

Also, our small firm representing Blue Spike unexpectedly lost a key associate in this litigation, Peter Brasher, without any notice. So we had a calendaring and distribution issue with respect to Audible Magic's damages report for \$6 million in counterclaim damages. Blue Spike needs to respond to this report, and as attorneys' for Blue Spike this is an issue that was our fault, not due to any fault of our client. We noticed the oversight after we had a discussion with you last week.

Please let us know if you need to have a conference call with the parties and we will circulate a call-in number.



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On Mar 23, 2015, at 5:26 PM, Perito, Andrew <andrew.perito@weil.com> wrote:

Prof. McGovern,

Plaintiff and Defendants Last.fm and Audible Magic have reach agreement on proposed modification to the schedules for our cases. Can you please let us know if these proposed changes are acceptable? I'm happy to set up a call if there's anything you'd like to discuss.

Best,
Andrew

<image001.jpg>

Andrew L. Perito

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From: Randall Garteiser [<mailto:rgarteiser@ghiplaw.com>]
Sent: Monday, March 23, 2015 11:40 AM
To: Perito, Andrew
Cc: Ramsey, Gabriel M.; AudibleMagic-BlueSpike; Reines, Edward; Walter Lackey; efindlay@findlaycraft.com; bluespike@ghiplaw.com
Subject: Re: Getting on the same page with Rebuttal Deadlines

Agreed.

thanks,

Randall

On Mar 23, 2015, at 1:14 PM, "Perito, Andrew" <andrew.perito@weil.com> wrote:

Hi Randall, please confirm these dates remain OK on your end so that we can send to Prof. McGovern with the agreement of all parties. Thank you.

Best,
Andrew

<image001.jpg>

Andrew L. Perito

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From: Ramsey, Gabriel M. [<mailto:gramsey@orrick.com>]
Sent: Friday, March 20, 2015 9:28 AM
To: Perito, Andrew; Randall Garteiser; AudibleMagic-BlueSpike; Reines, Edward; Walter Lackey; efindlay@findlaycraft.com
Cc: <bluespike@ghiplaw.com>
Subject: RE: Getting on the same page with Rebuttal Deadlines

Andrew, thank you for circulating this. These are acceptable to Audible Magic.

Best,
Gabe

From: Perito, Andrew [<mailto:andrew.perito@weil.com>]
Sent: Friday, March 20, 2015 9:26 AM
To: Randall Garteiser; AudibleMagic-BlueSpike; Reines, Edward; Walter Lackey; Eric Findlay
Cc: <bluespike@ghiplaw.com>
Subject: RE: Getting on the same page with Rebuttal Deadlines

Hi Randall,

Further to our call, attached are a draft joint motion and proposed order setting forth proposed amended dates. If everyone could please confirm that the parties are in agreement, we can then jointly send to Special Master McGovern so that he can confirm these dates are acceptable to the Court and, if the Court so requires, we can adjust the proposed dates.

Best,
Andrew

<image001.jpg>

Andrew L. Perito

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From: Randall Garteiser [<mailto:rgarteiser@ghiplaw.com>]
Sent: Wednesday, March 18, 2015 1:27 PM
To: AudibleMagic-BlueSpike; Perito, Andrew; Reines, Edward; Walter Lackey; efindlay@findlaycraft.com
Cc: <bluespike@ghiplaw.com>
Subject: Re: Getting on the same page with Rebuttal Deadlines

Walter and Eric,
My apologies for leaving you off this previous email.

Do the Defendants have any update on Blue Spike's request to set the deadline to exchange rebuttal reports on April 21, 2015?

Please advise.

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On Mar 16, 2015, at 11:11 PM, Randall Garteiser <rgarteiser@ghiplaw.com> wrote:

Gabe,

Any thoughts on my email below? I'm not even sure if the parties have a disagreement.

Blue Spike requests April 21 be the deadline due to multiple scheduling conflicts. We would like to file a stipulation to this effect. Please advise if Audible Magic and last.fm will oppose or agree.

Be well,
Randall

<image002.jpg>

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On Mar 13, 2015, at 5:10 PM, Randall Garteiser <rgarteiser@ghiplaw.com> wrote:

Gabe,

Just want to confirm that Audible Magic views the deadline for the rebuttal reports to be April 10, instead of the later April 23 date Blue Spike had previously advocated for.

Also, please advise your understanding of the deadline to file letter briefs for Summary Judgment. Is that April 23?

<image002.jpg>

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